



Staff Report

RESOLUTION ESTABLISHING CONDITIONS FOR THE APPROVAL OF A TRANSFER OF A CABLE TV FRANCHISE FROM RCN TELECOM SERVICES INC. TO ASTOUND BROADBAND LLC

Honorable Mayor and Council Members:

Summary

In September 2006, the City of Belmont and nine agencies in San Mateo County as well as the City and County of San Francisco received notice that the assets and franchises of RCN were being sold to Astound Broadband LLC (Astound). Astound Broadband LLC appears to have adequate financial capability to acquire and operate this system. Staff feels that it is in the City's interest to continue the relationship with RCN and its successor company as it may ultimately result in another choice for Cable TV services for residents of Belmont. A resolution is provided for Council consideration.

Background

In August 2000, the City Council approved a Cable TV franchise agreement with RCN Telecom Services (RCN) to provide Cable TV services to the residents of the City of Belmont. On June 20, 2001 the City issued a letter to proceed to RCN. Under the terms of the franchise, RCN needed to construct the first group of 10 nodes by June 20, 2002. Due to the downturn in the economy and stock market, RCN was unable to meet this requirement.

Discussion

First & Second Amendment to RCN Franchise

To address this failure to perform, staff members in Belmont and two other local cities in a similar position (Millbrae and San Carlos) jointly developed a settlement with RCN that became the first amendment to the franchise in July 2002. It provided for a \$50,000 penalty payment that enabled each City to use \$10,000 of the funds each year until a Cable TV system was constructed in those communities.

In the summer of 2004, RCN experienced further issues and requested a second amendment to the franchise in 7 cities, including Belmont. This amendment, executed in August 2004, provided another \$50,000 payment to the City, usable in \$10,000 per year increments, along with a multi-City fiber optic network along El Camino Real for a period of 25 years for the sum of \$1 per year.

Proposed Transfer of RCN Cable TV Franchise to Astound Broadband

In September, the nine agencies in San Mateo County and the City and County of San Francisco received notice that the assets and franchises of RCN were being sold to Astound Broadband LLC (Astound). Astound is a competitive video provider that has been active in the Contra Costa County area (Concord, Walnut Creek, Contra Costa County unincorporated areas) as well as in the Pacific Northwest. They are based in Kirkland, Washington with an office in the East Bay.

Under Federal Law and the terms of the City's non-exclusive Cable TV franchise with RCN, each franchising agency has the right to review the proposed transfer of the franchise to Astound. The 9 agencies in San Mateo County worked through the San Mateo County Telecommunications Authority (SAMCAT) to review the proposed transfer. Michael Friedman of Telecommunications Management Corp. (TMC) was retained by the agencies to perform this review.

The review by TMC resulted in a 35 page analysis of the proposed transfer. In summary, TMC notes that any transfer of the Cable TV Franchise from RCN to Astound should include an agreement between Astound and the City which continues the terms of the franchise as well as the first and second amendment to it. TMC also recommends that Astound cover the cost of the transfer review process (as required in the RCN franchise with Belmont), that it activate the third and fourth PEG channels that Belmont is entitled to under the existing franchise and that the attached agreement be signed by Astound.

Staff concurs with the TMC report and has worked with TMC to prepare the attached resolution which embodies these conditions. Staff also feels that it is in the City's interest to continue the relationship with RCN and its successor company as it may ultimately result in another choice for Cable TV services for residents of Belmont. Finally, Staff notes that City officials in Contra Costa County give Astound high marks for their customer service and marketing and indicate that their presence in Belmont and the San Mateo County market would be a plus. For all of these reasons, Staff recommends Council approval of the attached resolution and agreement with Astound.

General Plan/Vision Statement

No impact

Fiscal Impact

Adoption of this resolution itself will have no budget impact on the City.

If the new Cable TV provider does not build a Cable TV system in Belmont, the City will continue to have \$10,000 per year in penalty funds through 2009. If the new provider does build a Cable TV system in Belmont, the City will no longer have this funding but will instead receive franchise fees and Public, Education and Government Access Channel (PEG) funding instead.

The latter has the potential to provide more funding to the City in the long run.

Public Contact

Posting of City Council agenda

Recommendation

Staff recommends that the City Council adopt the attached resolution which establishes the conditions for the approval of a transfer of a Cable Television Franchise from RCN Telecom Services Inc. to Astound Broadband LLC.

Alternatives

1. Accept the Staff Report and adopt the attached Resolution Establishing Conditions for the Approval of a Transfer of a Cable TV Franchise from RCN Telecom Services Inc. to Astound Broadband LLC
2. Provide the Staff with alternative direction.

Attachments

- A. Resolution of the City Council Establishing Conditions for the Approval of a Transfer of a Cable TV Franchise from RCN Telecom Services Inc. to Astound Broadband LLC

Respectfully submitted,

Valerie Harnish
Information Services Manager

Thomas Fil
Acting City Manager

Staff Contact:

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(650) 637-2970

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RESOLUTION NO. _____

**Article I. RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELMONT
ESTABLISHING CONDITIONS FOR THE APPROVAL OF A TRANSFER OF A CABLE TV
FRANCHISE FROM RCN TELECOM SERVICES INC. TO ASTOUND BROADBAND LLC**

WHEREAS, RCN Telecom Services, Inc. ("Franchisee") owns and has a franchise to maintain a cable system ("System") in the City of Belmont ("City"); and,

WHEREAS, Franchisee has a franchise to provide cable service in the City pursuant to the terms of a cable system franchise ("Franchise") granted to Franchisee on November 28, 2000; and,

WHEREAS, City Resolutions No. 9303 (1st Amendment) and No. 9587 (2nd Amendment) amended certain terms of the Franchise; and,

WHEREAS, Franchisee and Astound Broadband, LLC ("Astound" or "Transferee") are parties to an asset purchase agreement ("Purchase Agreement") pursuant to which the System and the Franchise are to be transferred to Astound; and,

WHEREAS, on September 20, 2006, the City received an F.C.C. Form 394 requesting a transfer of the Franchise from Franchisee to Transferee; and,

WHEREAS, the City has one hundred twenty (120) days from the receipt of a complete F.C.C. Form 394 to act upon the transfer request or the request automatically is deemed to have been approved; and,

WHEREAS, the one hundred twenty (120) day review period expires on January 19, 2007 ; since the FCC Form 394 was received by the City on September 20, 2006; and,

WHEREAS, the Franchise cannot be transferred or assigned without the City Council's consent; and,

WHEREAS, federal regulations permit the City to evaluate the legal, technical and financial qualifications of Transferee to operate the Franchise; and,

WHEREAS, the legislative history of the Federal Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") further indicates that Congress intended that local franchising authorities consider such information as the effect of the transfer or sale on rates and subscriber services and the Transferee's plans for expanding or eliminating services to subscribers when assessing an application for transfer of a cable system franchise; and,

WHEREAS, the United States Court of Appeals for the Ninth Circuit, in a case involving the County of Santa Cruz, California and Charter Communications, found that local cable franchising authorities should be afforded broad deference in legislative acts in their role as stewards of the public good; and,

WHEREAS, the City, as steward of the public good, believes that the transfer will be in the best interest of its residents and potential System subscribers provided the transfer is conditioned in order to safeguard the interests of its residents and potential System subscribers; and,

WHEREAS, the City desires to proceed with the proposed transfer on the terms and conditions set forth herein.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belmont, does hereby resolve, determine and order as follows:

Section 1. The City hereby consents to the transfer, subject to the following conditions:

1. Astound Broadband, LLC, the Transferee, is owned and controlled as indicated in Exhibit A attached hereto. To the extent required by Section 2.5 of the Cable Television Franchise between the City and RCN, any change of ownership or control of Transferee from the ownership and control indicated in Exhibit A shall be subject to prior City review and consent.
2. The City expressly reserves any and all rights that it may possess under the Franchise and applicable law with respect to any non-compliance issues on the part of Franchisee, whether known or unknown, which exist prior to the effective date of this transfer and Transferee reserves any and all rights and defenses with respect to any such non-compliance issues.

In reserving such rights, the City confirms that the Franchisee is materially in compliance with the provisions of the Franchise and there exists no fact or circumstance known to the City which constitutes, or which, with the passage of time or the giving of notice or both, would constitute a material default or breach under the Franchise or would allow the City to cancel or terminate the rights hereunder, except upon the expiration of the full term of the Franchise.

3. The transfer is expressly contingent upon Franchisee reimbursing the City for the consultant's costs incurred in the processing of the request for transfer, not to exceed the maximum amount of \$20,000 indicated in the "Change of Ownership Consent Agreement" attached to this Resolution as Exhibit A. Said reimbursement shall be

provided within thirty (30) calendar days of Franchisee's receipt of an itemized invoice detailing the consultant's costs.

4. All terms of the Franchise agreement remain in full force and effect, including all terms contained in City of Belmont Resolutions No. 9303 (1st Amendment) and No. 9587 (2nd Amendment) and the agreements dated August 13, 2002 (1st Amendment) and dated September 28, 2004 (2nd Amendment) amending and clarifying certain terms of the Franchise.
5. The Franchise agreement allows the City to require Franchisee to provide up to two (2) additional Public, Educational and Governmental ("PEG") access channels. These two (2) PEG access channels will be in addition to the two (2) PEG access channels currently provided. Transferee agrees to activate and provide one additional PEG access channel by not later than April 20, 2007. This access channel may be located on Transferee's digital service tier. No sooner than twenty four months after the incumbent cable operator implements a third PEG channel and following receipt of one hundred twenty (120) days advance written notice, the Transferee shall provide a fourth PEG channel. This channel may be located on Transferee's digital tier of service. Transferee shall not be required to carry the third and fourth PEG Channels on the Basic Service tier until Transferee converts its entire System to a digital format.
6. Transferee shall evidence acceptance of these conditions by signing a copy of the "Change of Ownership Consent Agreement," in substantially the same form as attached to this Resolution as Exhibit A, containing the conditions provided to Transferee and submitting the same to the City Clerk within sixty (60) calendar days of this approval.

If Transferee fails to submit a signed copy of the "Change of Ownership Consent Agreement" to the City Clerk within said sixty (60) day period, or otherwise refuses to accept the conditions placed on the proposed transfer set forth herein, consent to the transfer shall be automatically withdrawn, effective the date of adoption of this Resolution, and the request to transfer shall be deemed denied.

Section 2. Other than with respect to the condition made in Section 1.2 above, if any sentence, clause, phrase or portion of any condition imposed in Section 1 hereof if for any reason held by a court of competent jurisdiction to be invalid or unenforceable, such decision shall not affect the validity of the remaining conditions placed on this transfer.

The City Council of the City of Belmont hereby declares that it would have adopted this Resolution and each and every condition set forth in Section 1 hereof separately, irrespective of the fact that one or more of these conditions may be declared invalid or unenforceable.

Section 3. This Resolution shall be deemed effective for the purposes of the transfer upon adoption by the City Council.

Section 4. Subject to the reservation of rights of Section 1(2) above, the City hereby releases Franchisee, effective upon the consummation of the transaction contemplated in the Purchase Agreement (the "Closing Date") from all obligations and liabilities under the Franchise that accrue on or after the Closing Date. Franchisee shall remain responsible for all obligations and liabilities under the Franchise that accrue up to the Closing Date. Transferee shall be responsible for any obligations and liabilities under the Franchise that accrue on or after the Closing Date.

Section 5. The City Clerk shall certify to the adoption of this resolution and shall cause the same to be processed in the manner required by law, and shall transmit a certified copy of this Resolution and Exhibits A hereto to Franchisee, Transferee and Guarantor.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belmont (fill in what the Council is resolving to do)

* * * * *

I hereby certify that the foregoing Resolution was duly and regularly passed and adopted by the City Council of the City of Belmont at a regular meeting thereof held on January 9, 2007 by the following vote:

AYES, COUNCILMEMBERS: _____

NOES, COUNCILMEMBERS: _____

ABSTAIN, COUNCILMEMBERS: _____

ABSENT, COUNCILMEMBERS: _____

CLERK of the City of Belmont

APPROVED:

MAYOR of the City of Belmont

EXHIBIT A
CHANGE OF OWNERSHIP CONSENT AGREEMENT

Section 1. The City hereby consents to the transfer, subject to the following conditions:

1. Astound Broadband LLC, the Transferee, is owned and controlled as indicated in Figure 1 attached hereto. Any change of ownership or control of Transferee from the ownership and control indicated in Figure 1 shall be subject to prior City review and consent.
2. The City expressly reserves any and all rights that it may possess under the Franchise and applicable law with respect to any non-compliance issues on the part of Franchisee, whether known or unknown, which exist prior to the effective date of this transfer, and Transferee reserves any and all rights and defenses with respect to any such non-compliance issues.

In reserving such rights, the City confirms that the Franchisee is materially in compliance with the provisions of the Franchise and there exists no fact or circumstance known to the City which constitutes, or which, with the passage of time or the giving of notice or both, would constitute a material default or breach under the Franchise or would allow the City to cancel or terminate the rights hereunder, except upon the expiration of the full term of the Franchise.

3. The transfer is expressly contingent upon Franchisee reimbursing the City for the consultant's costs incurred in the processing of the request for transfer, not to exceed the maximum amount of \$20,000 indicated in this Change of Ownership Consent Agreement. Said reimbursement shall be provided within thirty (30) calendar days of Franchisee's receipt of an itemized invoice detailing the consultant's costs.
4. All terms of the Franchise agreement remain in full force and effect, including all terms contained in City of Belmont Resolution No. 8903 and the agreement dated August 13, 2002 (1st Amendment, Resolution No. 9303) and agreement dated September 28, 2004 (2nd Amendment, Resolution No. 9576) amending and clarifying certain terms of the Franchise.
5. The Franchise agreement allows the City to require Franchisee to provide up to two (2) additional Public, Educational and Governmental ("PEG") access channels. These two (2) PEG access channels will be in addition to the two (2) PEG access channels currently provided. Transferee agrees to activate and provide one additional PEG access channel by no later than April 20, 2007. This access channel may be located on Transferee's digital service tier. No sooner than twenty four months after the incumbent cable operator implements a third PEG channel and following receipt of one hundred twenty (120) days advance written notice, then Transferee shall provide a fourth PEG channel. This channel may be located on Transferee's digital tier of service. Transferee shall not be required to

carry the third and fourth PEG Channels on the Basic Service tier until Transferee converts its entire System to a digital format.

6. Transferee shall evidence acceptance of these conditions by signing a copy of this "Change of Ownership Consent Agreement," in substantially the same form as attached to this Resolution as Exhibit A, containing the conditions provided to Transferee and submitting the same to the City Clerk within sixty (60) calendar days of this approval.

If Transferee fails to submit a signed copy of this "Change of Ownership Consent Agreement" to the City Clerk within said sixty (60) day period, or otherwise refuses to accept the conditions placed on the proposed transfer set forth herein, consent to the transfer shall be automatically withdrawn, effective the date of adoption of this Resolution, and the request to transfer shall be deemed denied.

Section 2. Other than with respect to the condition made in Section 1.2 above, if any sentence, clause, phrase or portion of any condition imposed in Section 1 hereof if for any reason held by a court of competent jurisdiction to be invalid or unenforceable, such decision shall not affect the validity of the remaining conditions placed on this transfer. The City Council of the City of Belmont hereby declares that it would have entered into this "Change of Ownership Consent Agreement" and each and every condition set forth in Section 1 hereof separately, irrespective of the fact that one or more of these conditions may be declared invalid or unenforceable.

Section 3. Subject to the reservation of rights of Section 2(2) above, the City hereby releases Franchisee, effective upon the consummation of the transaction contemplated in the Purchase Agreement (the "Closing Date") from all obligations and liabilities under the Franchise that accrue on or after the Closing Date. Franchisee shall remain responsible for all obligations and liabilities under the Franchise that accrue up to the Closing Date. Transferee shall be responsible for any obligations and liabilities under the Franchise that accrue on or after the Closing Date.

Section 4. This Agreement shall be effective upon the Closing Date at which time Franchise and System ownership shall have transferred from Franchisee to Transferee.

“City”
City of Belmont

“Transferee”
Astound Broadband, LLC

, Mayor

By: _____

Its: _____

Date: _____

Attest:

_____, City Clerk

Approved as to Form:

_____, City Attorney

